IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 156 of 1982

with
CIVIL APPLICATION No 10248 OF 2000
in
SECOND APPEAL No 156 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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PATAN MUNICIPALITY

Versus

BABUBHAI M SHAH

Appearance:

1. Second Appeal No. 156 of 1982
MR SURESH C SHAH for appellant
MR SK JHAVERI for respondent

2. Civil Application No.10248 OF 2000
MR SURESH C SHAH for applicant
MR SK JHAVERI for opponent

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 08/11/2001

COMMON C.A.V. JUDGEMENT

This appeal by the Patan Municipality, the original defendant of Regular Civil Suit No.110 of 1977 has been filed against the common judgment and order dated 22-10-1981 passed in Regular Civil Appeal No.154 of 1980 and Regular Civil Appeal No.155 of 1980 by the learned District Judge, Mehsana, whereby the learned Judge, while allowing the said appeals, has passed the following order in Regular Civil Appeal No.154 of 1980:

"Regular Civil Appeal No.154 of 1980 is allowed and Regular Civil Suit No.110/77 is partially decreed and the defendant-Patan Nagar Palika and its servants, employees and persons acting through it are restrained from carrying out or allowing to carry out any construction and make alteration on the line of the road fixed by the final development plan or Patan Town till and the final development plan is varied by the State Government and the alteration is made in the final development plan so as to shift the line of the road and permission of Collector is secured."

It is made clear that against the judgment and order passed in Regular Civil Appeal No.155 of 1980 which was arisen from Regular Civil Suit No.93 of 1976, no appeal has been filed and, therefore, the judgment and order passed in Regular Civil Appeal No.155 of 1980 become final between the parties.

2. The facts in brief are as under:

2.1 A property bearing Survey No.181, Municipal Census No.1/902 was purchased by the plaintiff from Manilal Gabruchand by a sale deed dated 20-2-1968 and permission was granted by the Municipality on 28-3-1972 to construct a house. Since he has not made construction admeasuring 4'x10'' east-west and 1'x6'' north-south land situated on backside towards south as it forms part of road line, but constructed in remaining area, the construction of mosque of Rangrej community bearing Survey No.180 situated on southern side was pulled down thereby the house of the plaintiff would be facing the main road. Since the defendants are making constructions in portion of Survey No.180 earmarked in roadline, a suit was filed by the plaintiff for declaration and permanent injunction that since the defendants have no right to

make a construction in roadline of Survey No.180, they be permanently restrained from making construction in it. The plaintiff has also filed another suit bearing No.110 of 1977 against the defendant for permanent injunction restraining them from making any change in roadline on the southern side of Survey No.181. Since the defendant-Municipality wanted to widen the road, it acquired the properties on main road and also land of Survey No.180. As the defendant wanted to give benefit to the mosque so that it would come ahead of the property of the plaintiff, it made some changes in roadline and hence, the plaintiff made a complaint that he has been meted out a discriminatory treatment favouring Rangrej Trust and hence, aforesaid suit was filed by the plaintiff.

2.2 A written statement was filed by the defendant trust at Ex.41 contenting that since a compromise decree was arrived at between Patan Municipality and State of Gujarat on 30-10-1975 in Regular Civil Suit No.45 of 1973, it has changed the roadline of 3 feet land north-south on northern side and eastern wall of mosque was released from roadline. They claimed that they have all the powers to make constructions in the land which did not form part of roadline and hence, the suit was liable to be dismissed.

2.3 The defendant-Municipality also filed written statement at Ex.123 contenting that the State of Gujarat should be a party to the suit as the State Government can only change the roadline. It was further contended that all the religious institutions have been given certain type of exemptions from the road line and hence, in a suit filed by Rangrej Mosque Trust against the State of Gujarat, a compromise was arrived at and a consent decree was passed. It was finally contended that no discrimination was meted out to plaintiff favouring Rangrej Mosque Trust and hence, the suit be dismissed with costs.

2.4 Considering the submissions made on behalf of the parties, the Court below has dismissed the suit of the plaintiff with costs vide common judgment and award dated 10-4-1980. Being aggrieved by the said common judgment and award rendered by the learned Civil Judge (J.D.), Patan, Regular Civil Application No.154 of 1980 was filed by the original plaintiff in the District Court at Mehsana. The learned District Judge, Mehsana allowed the said appeal and Regular Civil Suit No.110 of 1977 was partly decreed vide judgment and aforesaid order dated 22-10-1981 which has given rise to file the present

Second Appeal by the Patan Municipality.

3. I have heard M/s S.C.Shah and S.K.Jhaveri, learned counsel for the appellant and respondent respectively. I have also gone through the judgment as well as record and proceedings which have been shown to me by the learned counsel for the respective parties.

4. Mr.Shah has relied upon the case of Firm of M/s Habibbhai Gulam Mohmad Vs. The Municipal Corporation, Ahmedabad reported in 1962 G.L.R. 924. He has also relied upon the case of J.N.Ganatra Vs. Morvi Municipality, Morvi, reported in AIR 1996 S.C. 2520. Keeping in mind the above aspects of the matter and the law laid down by this Court as well as by the Apex Court in aforesaid judgments, I proceed further.

5. It is established from the record and proceedings that a final development plan for Patan town, Mehsana district was sanctioned under a Government Notification dated 11-1-1968 and 40 feet wide road alignment passing through suit property was fixed in the development plan pursuant to which, as the appellant Patan Municipality wanted to change or shift the roadline as a rasult of a settlement that has been arrived at between the parties, a specific resolution dated 5-8-1976 Ex.71 has been passed by the Patan Municipality and moved the State Government to make alteration in the development plan. The Government issued notification dated 24-5-1977 Ex.72 under the provisions of Sec.10-A of the Bombay Town Planning Act inviting objections from the persons likely to be affected by the change in development plan and as the Government has not taken any further action in changing the roadline, the appellant Municipality could not make change in the final plan which has been sanctioned by the Government and, therefore, the present respondent-original plaintiff, who was affected, had filed a suit and same was dismissed by the Court below. Being aggrieved by the same, Regular Civil Appeal No.154 of 1980 was preferred by him before the District Court. Said appeal was allowed by the learned District Judge, Mehsana vide judgment and order dated 22-10-1981 and order has been reproduced in para 1 of this judgment.

6. It is also established that while allowing Regular Civil Appeal No.154 of 1980, Lower Appellate Court has kept in mind the interest of all parties including the present appellant and others and, therefore, Court has not prohibited the Patan Municipality from making any alteration in the roadline and removing building material etc. as prayed by the

plaintiff. Court has also kept in mind the interest of Patan Municipality by a specific order by restraining it from carrying out or allowing to carry out any construction and make alteration in the roadline fixed by the final development of Patan Town till final development plan is varied by the State Government and alteration is made in it to shift the roadline and Collector's permission is obtained. By the order of the Lower Appellate Court, Patan Municipality was at liberty to have construction or shift the roadline after the final development plan is varied by the Government and changes to that effect are made in it for shifting the roadline and after obtaining permission from the Collector. The Court has also come to the conclusion that in case any final development plan for the town was sanctioned and final notification to that effect was issued, procedures prescribed under the provisions of Sec.53 onwards of the Gujarat Town Planning and Urban Development Act, 1976 as also provisions of Sec.150 of the Gujarat Municipality Act, 1963 are required to be followed. Court comes to the conclusion that before shifting the roadline, the procedures as aforesaid, are required to be followed by appellant Municipality and admittedly in this case, same have not been followed or complied till final disposal of appeal and, therefore, they have been restricted to the extent of following the procedures. I am in agreement with the view taken by the Lower Appellate Court that Patan Municipality will not be able to proceed further without observing the procedures stated hereinabove in view of the judgment reported in AIR 1996 S.C. 2520. It is a settled proposition of law that power has to be exercised in accordance with the provisions of Statute and in no other manner and where it has not been exercised the way it is required to be done under the Act, the same is illegal and void on the face of it and act done by the Municipality in pursuance of the same is patently and grossly in violation of the plain provisions of the Act and it cannot be treated to have been passed under the Act and hence, would not be governed by the limitation prescribed under the Act. In view of the above, though I am in agreement with the law laid down by the High Court as well as the Apex Court in the judgments relied upon by the learned counsel for the appellant, appellant will not be entitled to the benefits.

7. Another question which has been raised by the learned counsel for Patan Municipality is regarding the change having taken place during the pendency of Second Appeal. But it is a settled proposition of law that subsequent events are not required to be taken into

consideration while deciding Second Appeal and no evidence worth the name has been produced by the appellant except saying that subsequent event has been taking place and, therefore, there is no substance in the said question raised by the learned counsel for the appellant. At the cost of repetition, I would like to say that interest of the appellant has been protected by the Lower Appellate Court while allowing the appeal and, therefore, I do not think it fit and proper to interfere with the said judgment and order rendered by the Lower Appellate Court in this Second Appeal and hence, this Second Appeal is required to be rejected.

8. This Second Appeal is rejected. Notice is discharged.

9. In view of the above order of rejection of Second Appeal, Civil Application No.10248 of 2000 filed for bringing the subsequent change of events is also rejected.

(R.P.DHOLAKIA,J.)

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